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IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

REGINALD DEXTER CARR, JR.,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR RESPONDENT REGINALD DEXTER CARR, JR.

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QUESTIONS PRESENTED

1. Whether the refusal to sever Reginald Carr's penalty-phase proceeding from his brother's violated the Eighth Amendment in this capital case.

2. Whether ambiguous jury instructions that suggested the defendants bore the burden of proving mitigating circumstances beyond a reasonable doubt violated the Eighth Amendment.

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BRIEF FOR RESPONDENT REGINALD DEXTER CARR, JR.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law * * * " U.S. Const. amend. XIV, § 1.

Relevant Kansas statutory provisions are reprinted in the addendum.

COUNTERSTATEMENT

1. In Kansas, "capital murder" is punishable by death. Kan. Stat. Ann. § 21-6617. Following a capital murder conviction, the trial court conducts a separate penalty-phase proceeding to determine whether death is the appropriate sentence. *Id.* § 21-6617(b), (c). For a defendant to receive the death penalty, the jury must make two findings unanimously and beyond a reasonable doubt. First, it must find the existence of one or more of the aggravating circumstances enumerated in Kan. Stat. Ann. § 21-6624. Second, it must find that those statutory aggravating circumstances are not outweighed by any mitigating circumstances. *Id.* § 21-6617(e).

2. Reginald and Jonathan Carr are brothers accused of committing a series of violent crimes together in Wichita, Kansas, in 2000—when Reginald was 23 years old and Jonathan was 20. 41-A 11/05/02 Tr. 39, 54; Pet. App. 28-45.[1] The crimes involved multiple rapes, sexual assaults, and robberies, culminating in the murders of four people on a December night. Pet. App. 28-45. Reginald and Jonathan were each charged with capital murder, among other offenses. *Id.* at 65-66; Kan. Stat. Ann. § 21-5401(a)(6) (formerly § 21-3439(a)(6)).

The Carrs moved to be tried individually. Pet. App. 122-134. Jonathan acknowledged that joint proceedings would "prejudice Reginald" by turning Jonathan into "another prosecutor in the room." 77 Appellate Record 04/23/02 Tr. 51; *see also id.* at 52 (Jonathan's attorney: "We're going to get into things on Reginald

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[1]Unless otherwise noted, "Pet. App." citations refer to the petition appendix in Reginald's case, No. 14-450.

that there's no way the State would get to introduce into evidence against him if he was sitting there by himself."). The Kansas state trial court nevertheless denied the requests for severance and held a joint guilt-phase trial in front of a single jury. Pet. App. 122-134. The jury convicted each brother of capital murder. *Id.* at 27.

Following those convictions, the court denied the Carrs' renewed motions for severance and conducted a joint penalty-phase proceeding in front of the same jury. *Id.* at 406. The State presented no new evidence in its penalty-phase case-in-chief; instead, it relied entirely on the evidence presented during the guilt phase, and urged the jury to find four statutory aggravating circumstances, each relating to how the crimes were committed. *Id.* at 381-382. The State told the jury to ask whether those aggravating circumstances "outweigh any mitigators that are presented by the defendants, whatever they choose to prove." 41-A 11/05/02 Tr. 10. And the State contended that "there is no mitigation that can rise to the threshold" of justifying a sentence less than death. *Id.* at 13.

When it was the defendants' turn to present evidence, no bright line segregated Reginald's mitigation case from Jonathan's. For example, Reginald would call a witness in his mitigation case, and if Jonathan also wanted to call the same witness, he would simply examine the witness after Reginald did. *See, e.g., id.* at 36, 112. Reginald and Jonathan also took turns calling new witnesses. *See, e.g.*, 42 11/06/02 Tr. 142.

In his mitigation case, Reginald presented evidence that he grew up in an environment full of illicit

sexual conduct, illegal drug use, and violence, with no one to look up to or guide his way. For instance, the jury heard reports that Reginald's and Jonathan's father sexually abused their older sister Temica, and eventually abandoned the family when Reginald was 10. 41-A 11/05/02 Tr. 52-53, 80-81; 41-B 11/05/02 Tr. 74. Family members also testified that the children were neglected and physically abused by their mother Janice. 41-B 11/05/02 Tr. 72-77; 45-B 11/12/02 Tr. 143, 146-148. When Reginald misbehaved, Janice would force him to strip and then whip him with a belt or an electrical cord while the other children held him down. *Id.* Thomas Reidy, a forensic psychologist, recounted hearing about these and other incidents of physical and sexual abuse when he interviewed Reginald and his relatives. 43-A 11/07/02 Tr. 64-65, 69-70, 73-74, 81. Dr. Reidy also learned that Janice abused cocaine and that Reginald held drugs for drug dealers at a young age. *Id.* at 54, 56. According to Dr. Reidy, these "severe" "developmental traumas" risked not only physical but also emotional and psychological damage to Reginald. *Id.* at 85.

In addition, Reginald presented evidence that he suffered from brain damage and mental illness. David Preston, an expert in nuclear medicine, reviewed positron emission tomography (PET) scans of Reginald's brain, and concluded that the areas of his brain responsible for short-term memory and risk assessment were 50 percent less active than those of a normal brain. 42 11/06/02 Tr. 9, 36, 69-70, 80. Agreeing that Reginald had brain damage, Mitchel Woltersdorf, a neuropsychologist, determined that Reginald suffered "significant head trauma" sometime during the first nine years of his life. 44

11/08/02 Tr. 45-46. Dr. Woltersdorf also testified that Reginald had developed antisocial personality disorder by age 5. *Id.* at 41-42.

For his part, Jonathan Carr relied on similar evidence of a traumatic childhood and a damaged brain, but took the additional step of portraying his older brother Reginald as a corrupting influence. For example, Jonathan's attorney elicited testimony that Reginald "was an influence on Jonathan as they grew up." 41-A 11/05/02 Tr. 116. Indeed, Jonathan tried "to emulate Reggie." *Id.* Both Janice and Temica agreed that Reginald's influence was negative; in fact, they warned Jonathan to stay away from his older brother so he would not get into trouble. *Id.* at 120; 41-B 11/05/02 Tr. 89. According to Mark Cunningham, a forensic psychologist who testified on Jonathan's behalf, when Jonathan was only 6 or 7, Reginald prompted him to engage in sexual activity with a peer-age girl; and when they were older, Jonathan would "get drunk" and "smoke marijuana heavily" when Reginald visited. 45-A 11/12/02 Tr. 26, 109. As Dr. Cunningham discovered from interviewing Temica, "Reggie would ridicule Jonathan as being weak, a wus, and other—other disparaging adjectives about his lacking masculinity when he didn't do what Reggie wanted him to do." 45-B 11/12/02 Tr. 37; *see also* 45-A 11/12/02 Tr. 57-58, 64. Jonathan's attorney summed it up for the jury this way: "When [Jonathan]'s not around Reggie, he does pretty well." 41-A 11/05/02 Tr. 33.

In rebuttal, the State called Norman Pay, a neuroradiologist, who reviewed the PET scans and testified that Reginald's brain was normal. 46 11/13/02 Tr. 59, 65-67. The State also sought to discredit the defendants' witnesses in other ways. During cross-

examination of Dr. Reidy, for example, the State represented that the brothers' father had "den[ied] much of the information that ha[d] been provided to [Dr. Reidy]"—including that he had sexually abused Temica. 43-A 11/07/02 Tr. 90-92. In questioning the basis for Dr. Reidy's testimony, the State suggested that it was simply doing what the defense had done during the guilt phase: "get[ting] up and say[ing] where did that come from, what does it mean, challeng[ing] the evidence." *Id.* at 92. The State sounded the same theme in its closing argument, telling the jury: "Cunningham and Reidy made no attempt to independently verify the things they told you. They relied solely on biased accounts and accounts given of the family members which were even different between themselves. Can you rely on that?" 46 11/13/02 Tr. 190.

The trial court instructed the jury to "consider and weigh everything admitted into evidence during the guilt phase or the penalty phase of this trial that bears on either an aggravating or a mitigating circumstance." Pet. App. 500. The court also instructed the jury that "[t]he State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist." *Id.* at 501; *see also id.* at 458. The instructions did not address what, if any, burden of proof the jury should apply in determining whether a mitigating circumstance could be "found to exist." *Id.* at 445. After deliberating for a full day, the jury sentenced each brother to death. 47 11/14/02 Tr. 3-14.

3. On direct review, a divided Kansas Supreme Court affirmed one capital murder count for Reginald, but vacated his death sentence and remanded

for a new penalty phase. Pet. App. 28, 413-414; Kan. Stat. Ann. § 21-6619(b).

The Kansas Supreme Court acknowledged that the Eighth Amendment "does not categorically mandate separate penalty phase proceedings for each codefendant in a death penalty case." Pet. App. 406. But it explained that in the unusual circumstances of this particular case, a joint penalty-phase proceeding violated the defendants' Eighth Amendment rights. *Id.* at 412. According to the supreme court, the mitigation defenses of the two brothers were antagonistic because Jonathan's evidence tended to "differentiate" Jonathan from Reginald on a "moral" level. *Id.* at 407. The court pointed specifically to testimony that Reginald had a "corrupting influence" on his younger brother. *Id.* at 411. Though mitigating for Jonathan, that testimony "was prone to being used as improper, nonstatutory aggravating evidence against [Reginald]." *Id.* Severance was the only way to avoid that unconstitutional risk. Indeed, the court reasoned, this was that "rare instance" in which a limiting instruction—directing the jury to consider the evidence only as to Jonathan—could not suffice, because the evidence "simply was not amenable to orderly separation and analysis." *Id.* at 411. The refusal to sever was therefore unconstitutional. And in the judgment of the court, that constitutional violation was not harmless. *Id.* at 413. Accordingly, the court remanded for new, separate penalty phases for each defendant, before two different juries. *Id.* at 413-414.

To give the trial court additional guidance on remand, the supreme court also addressed whether the failure to clarify the burden of proof with respect to mitigating circumstances violated the Eighth

Amendment. Relying on its previous opinion in *State* v. *Gleason*, 329 P.3d 1102 (Kan. 2014), the court answered yes. Pet. App. 446. In *Gleason*, the court considered nearly identical jury instructions with respect to mitigating circumstances. It observed that Kansas law "places no evidentiary burden regarding the existence of mitigating circumstances on the defendant beyond the burden of production." *Gleason* Pet. App. 102; *see also id.* at 101 (noting that Kansas law is "silent as to any burden of proof for mitigating circumstances" (citing former Kan. Stat. Ann. § 21-4624(e) (now § 21-6617(e)); *Kansas* v. *Marsh*, 548 U.S. 163, 173 (2006)). And yet, the instructions in question "left [the jury] to speculate as to the correct burden of proof for mitigating circumstances, and reasonable jurors might have believed they could not consider mitigating circumstances not proven beyond a reasonable doubt." *Id.* at 102. The instructions therefore violated the Eighth Amendment because "jurors may have been prevented from giving meaningful effect or a reasoned moral response" to mitigating evidence that did not satisfy this very high burden. *Id.*

The court held that the Carrs' jury instructions suffered from the same flaw. As in *Gleason*, "nothing in the instructions mention[ed] any burden other than 'beyond a reasonable doubt.'" Pet. App. 446. And, as in *Gleason*, the jury may have interpreted these instructions to prevent it from "giving meaningful effect" to mitigating circumstances that were not proven beyond a reasonable doubt, in violation of the Eighth Amendment. *Id.* (internal quotation marks omitted). "In any new penalty phase on remand," the court concluded, "the [trial] judge must ensure that jurors understand that mitigating cir-

cumstances need not be proven beyond a reasonable doubt." *Id.* The supreme court noted that if it were not already vacating the death sentence because of the refusal to sever, "error on this issue would have forced [it] to do so." *Id.*

SUMMARY OF ARGUMENT

The crimes in this case were horrific. But all defendants—no matter their offense of conviction—are entitled to be sentenced in accordance with the Constitution. In this case, two aspects of the sentencing proceeding violated the Eighth Amendment: the fact that the two brothers' proceedings were joined, and the fact that the jury instructions were ambiguous on a matter, quite literally, of life and death.

I. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." It is well settled that the death penalty is cruel and unusual when imposed in an arbitrary or irrational way. To prevent such arbitrariness, States have adopted procedures for guiding the jury's sentencing discretion in capital cases. Many States, for example, direct a jury to weigh specified aggravating factors against relevant mitigating circumstances in determining whether a defendant who is eligible for the death penalty should receive it. But even with such procedures in place, arbitrariness can nevertheless infect the weighing process. For instance, a jury might consider an element on death's side of the scale that does not belong there. And when the weighing process itself is skewed, the imposition of the death penalty is no longer rational and consistent; it is unconstitutional.

In this case, the joint penalty phase created a substantial risk of skewing the weighing process for Reginald Carr. The joint proceeding introduced a second prosecutor against Reginald: his own brother. Jonathan had a constitutional right to produce any evidence in mitigation. And in exercising that right, Jonathan presented evidence that Reginald had a corrupting influence on him while growing up. That evidence, while mitigating for Jonathan, tended to *support* a death sentence for Reginald. Had Reginald been sentenced alone, the prosecution would not have been permitted to introduce that evidence at all, because it fell beyond the rubric of any valid sentencing factor. Joinder thus resulted in the jury considering evidence against Reginald that would have otherwise been excluded. And that additional evidence inevitably biased the jury against him, impermissibly tilting the scales in favor of death.

Because there is a substantial risk that the weighing process itself was skewed, the joint proceeding violated the Eighth Amendment. Measures short of severance would not have sufficed. Mere jury instructions, for example, could not have cured the violation, because what was prejudicial about the additional evidence to Reginald cannot be separated from what was mitigating about it for Jonathan. And the constitutional violation cannot be disregarded as harmless beyond a reasonable doubt, given the powerful nature of the evidence and the strength of Reginald's mitigation case.

II. The sentencing proceeding in this case was infected by a second constitutional error: Ambiguous jury instructions suggested to the jury that the defendants bore the burden of proving mitigating circumstances beyond a reasonable doubt.

A. Under the Eighth Amendment, a jury must be able to give meaningful effect to all mitigating evidence. A reasonable doubt standard for mitigating circumstances runs afoul of this fundamental rule. Reasonable doubt is an exceedingly high burden; it is typically placed on the *prosecution* in criminal cases to ensure that a defendant is not wrongfully condemned. But when a defendant is required to prove mitigating circumstances beyond a reasonable doubt, it has precisely the opposite effect. Defendants will be condemned to death despite credible mitigating evidence that counsels in favor of life, merely because that evidence does not establish the existence of a mitigating circumstance to an utmost certainty. The Eighth Amendment does not countenance such a risk. Indeed, such a standard is patently "unusual" under the Eighth Amendment: No State anywhere applies a reasonable doubt standard to mitigating circumstances—not even Kansas.

The problem in this case, as the Kansas Supreme Court concluded, is that the instructions failed to make that clear. On the contrary, they repeatedly asked the jurors to consider those mitigating circumstances that they "found to exist," without specifying the standard that should be applied in making that determination. The *only* standard that the instructions discussed was the reasonable doubt standard. And they repeatedly referred to aggravating and mitigating circumstances in parallel fashion—suggesting that the reasonable doubt standard applied to both. The language of the instructions thus created a reasonable likelihood that the jury applied a reasonable doubt standard to mitigating circumstances. That risk was only enhanced by the course of the proceedings, during which the prosecu-

tion reinforced the impression that mitigating circumstances had to be proven beyond a reasonable doubt. Because there is at least a reasonable likelihood that the jury understood the instructions in this case to bar the consideration of mitigating circumstances not proved beyond a reasonable doubt, the instructions violated the Eighth Amendment.

B. Even if a State were permitted to impose a reasonable doubt standard on mitigating circumstances, the ambiguous instructions in this case would still violate the Eighth Amendment. A State is not required to limit the jury's discretion to determine whether a defendant who is eligible for the death penalty should receive it. But when a State does choose to channel the jury's discretion, it may not do so in a way that introduces arbitrariness into the process. The ambiguous instructions in this case do just that: Because they leave the jury to speculate as to what burden of proof applies to mitigating circumstances, some defendants will be sentenced under a reasonable doubt standard, while others will have their mitigating evidence subjected to no burden at all, in accordance with Kansas law. As a consequence, the same evidence might be placed on the mitigation side of the scale for one defendant but not for another, based merely on what interpretation of the instructions the jury happens to adopt. The Eighth Amendment does not tolerate that possibility of randomness in the administration of the death penalty.

Because Reginald Carr's sentencing proceeding did not comply with the Eighth Amendment, the Kansas Supreme Court should be affirmed.

ARGUMENT

I. THE REFUSAL TO SEVER THE PENALTY PHASE VIOLATED THE EIGHTH AMENDMENT

A. Joinder Violates The Eighth Amendment When It Creates A Substantial Risk That The Jury's Weighing Process Will Be Skewed

1. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." This Court has long read this prohibition to bar "the arbitrary or irrational imposition of the death penalty." *Parker* v. *Dugger*, 498 U.S. 308, 321 (1991). "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano* v. *Florida*, 468 U.S. 447, 460 (1984). If there were "no principled way" of making that distinction, *Godfrey* v. *Georgia*, 446 U.S. 420, 433 (1980) (plurality opinion), the death penalty would be "cruel and unusual in the same way that being struck by lightning is cruel and unusual," *Furman* v. *Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

To "protect[] against arbitrary and capricious impositions of the death sentence," *Sawyer* v. *Whitley*, 505 U.S. 333, 341 (1992), many States guide the jury's sentencing discretion through two steps, known as the eligibility and selection phases. First, at the eligibility phase, they "limit the class of murderers to which the death penalty may be applied" by requiring the jury to find the existence of at least one statutorily defined aggravating circumstance.

Brown v. *Sanders*, 546 U.S. 212, 216 (2006). Second, at the selection phase, they "channel" the jury's determination of "whether a defendant thus found eligible for the death penalty should in fact receive it" by "specifying the aggravating factors * * * that are to be weighed against mitigating considerations." *Id.*

But even when a State has adopted such a scheme, the Eighth Amendment demands "careful scrutiny" of the jury's "deliberative process." *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983). That is because, notwithstanding these procedures, "the weighing process itself [could] be[] skewed." *Stringer* v. *Black*, 503 U.S. 222, 232 (1992). For example, the jury could consider an "improper element," *Sanders*, 546 U.S. at 220, on "death's side of the scale," *Stringer*, 503 U.S. at 232. And when that happens, the imposition of the death penalty is no longer rational and consistent; it is arbitrary and capricious. *See id.* ("When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence."). Accordingly, the Eighth Amendment does not tolerate a substantial risk that the weighing process will be skewed. *See Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

This Court applied these principles in *Sanders* and *Stringer*. In those cases, the Court addressed what happens when a jury considers a sentencing factor

(for example, an aggravating circumstance) that is later declared invalid (on either state- or federal-law grounds). *Sanders*, 546 U.S. at 216, 223. And the Court explained that the jury's consideration of such a factor "skew[s]" the weighing process in some cases but not others, depending on what evidence the jury considered in relation to that factor. *Id.* at 221. If "one of the other sentencing factors enable[d] the sentencer to give aggravating weight to the same facts and circumstances," there is no skewing and thus no Eighth Amendment violation. *Id.* at 220. But if "the jury could *not* have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor," *id.* at 221 (emphasis added), "the weighing process itself has been skewed," in violation of the Eighth Amendment. *Stringer*, 503 U.S. at 232; *see also Sanders*, 546 U.S. at 221. That is because a "thumb" has been placed on "death's side of the scale," and "a reviewing court may not assume it would have made no difference if the thumb had been removed." *Stringer*, 503 U.S. at 232.

In short, this Court has held that the Eighth Amendment prohibits sentencing procedures that create a substantial risk that the death penalty will be imposed in an arbitrary manner. It has concluded that the death penalty is imposed in an arbitrary manner whenever the jury's weighing process is skewed. And it has explained that the weighing process is skewed whenever evidence beyond the rubric of any valid sentencing factor figures into the jury's calculus.

2. From these principles, it follows that a joint penalty phase violates the Eighth Amendment

whenever it creates a substantial risk that the weighing process will be skewed.

When a capital defendant is sentenced alone, he faces a single source of evidence against him: the prosecution. In many jurisdictions, including Kansas, the prosecution in the penalty phase is limited in the evidence it can present. *See, e.g.*, Kan. Stat. Ann. § 21-6617(c); *State* v. *Kleypas*, 40 P.3d 139, 276 (Kan. 2001), *abrogated on other grounds by Marsh*, 548 U.S. 163. Thus, the prosecution may not present just *any* evidence in support of a death sentence. Rather, the prosecution may present only evidence relevant to a valid sentencing factor, such as an aggravating circumstance enumerated by statute or a mitigating circumstance raised by the defendant.

When a capital defendant is sentenced jointly with another, each faces the possibility of an additional source of evidence against him: the other defendant. That is because each defendant has an Eighth Amendment right to present—and for the jury to consider—all mitigating evidence. *See Sumner* v. *Shuman*, 483 U.S. 66, 76 (1987); *infra* pp. 36-43. And evidence that is mitigating for one defendant may in fact support the death penalty for the other.

That additional evidence does not necessarily or always skew the jury's weighing process. Where the evidence falls within the scope of "some other, valid sentencing factor," *Sanders*, 546 U.S. at 221, there is no Eighth Amendment violation. The jury is not told to consider any evidence with respect to a defendant that it could not otherwise consider if he were sentenced alone.

But where one defendant's mitigating evidence falls beyond the rubric of any valid sentencing factor for

the other defendant, there is a substantial risk that joinder will skew the weighing process. The jury *is* told to consider evidence that it could not otherwise consider against that other defendant if he were sentenced alone. And considering that evidence will inevitably bias the jury against him, tilting the scales in favor of death. When there is a substantial risk that a joint penalty phase will skew the weighing process in this way, the Eighth Amendment requires severance.

B. The Refusal To Sever Created A Substantial Risk That The Weighing Process Was Skewed

In this case, the joint proceeding created a substantial risk that the weighing process for Reginald Carr was skewed.

As the Kansas Supreme Court noted, one of the themes of Jonathan Carr's penalty-phase evidence was that Reginald was a "negative influence" in Jonathan's life. Pet. App. 406. In his opening statement at the outset of the penalty phase, Jonathan's attorney previewed to the jury what the evidence would show: "When [Jonathan's] not around Reggie, he does pretty well." 41-A 11/05/02 Tr. 33. Jonathan then proceeded to present such evidence through multiple witnesses.

Among those who testified on Jonathan's behalf was Janice Harding, the brothers' mother. In response to questions from Jonathan's attorney, Janice testified that "[m]ost younger brothers look up to their big brothers," and that Jonathan was no different: He tried "to emulate Reggie." *Id.* at 116. She "could see that Reggie was an influence on Jonathan as they grew up." *Id.* Indeed, she explained, "when

Reggie is around," Jonathan likes to "go with Reggie and do things with Reggie." *Id.* at 119. But Janice lamented the fact that Jonathan is "a little different when he's with Reggie." *Id.* And so Janice told Jonathan, "don't be running around with Reggie because you're going to end up in trouble." *Id.* at 119-120. Janice likewise "told Reggie" to "leave Jonathan alone, he don't need to be in no trouble." *Id.* at 120.

The brothers' older sister, Temica Harding, testified to the same dynamic between the two brothers when questioned by Jonathan's attorney. Like their mother, Temica said that Jonathan would "look up to" and "follow Reggie." 41-B 11/05/02 Tr. 89. She also agreed that Reginald was a bad influence on his younger brother, explaining that she "told [Jonathan] all the time" that "you got to stay away from Reggie." *Id.*

In addition, Jonathan called a forensic psychologist, Mark Cunningham, to the stand. 45-A 11/12/02 Tr. 4-5. In preparing for his testimony, Dr. Cunningham "interviewed a number of people," including Jonathan, Temica, and other relatives. *Id.* at 38. Based on those interviews, Dr. Cunningham reported that "family members in [Jonathan's] immediate household"—including "Reggie"—"were not modeling positive behaviors." *Id.* at 57-58. In fact, Dr. Cunningham testified, "Reggie's presence may [have] be[en] a situational factor" that led to Jonathan's criminal behavior. *Id.* at 64.

Dr. Cunningham gave a number of examples of Reginald's negative influence on Jonathan. When Jonathan was 6 or 7, "Reggie prompted a peer-age girl named Amber to begin having sexual interac-

tions with Jonathan." 45-B 11/12/02 Tr. 26. When Jonathan was 19, "he would get drunk every other weekend when Reggie visited"—"that was a joint activity for them." 45-A 11/12/02 Tr. 109. "And then again, after Reggie's release from prison, when Reggie would visit, they would smoke marijuana heavily together." *Id.* Jonathan told Dr. Cunningham that he "looked up to Reggie." 45-B 11/12/02 Tr. 37. And according to Dr. Cunningham's interview with Temica, "Reggie would ridicule Jonathan as being weak, a wus, and other—other disparaging adjectives about his lacking masculinity when he didn't do what Reggie wanted him to do." *Id.*

For Jonathan, all of this testimony about Reginald's "corrupting influence" while growing up was *mitigating*. Pet. App. 411. It was offered to make Jonathan appear *less* culpable, by attributing his criminal behavior to a "difficult family history" beyond his control. *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982); *see also Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989) (*Penry I*), *abrogated on other grounds by Atkins* v. *Virginia*, 536 U.S. 304 (2002). Accordingly, Jonathan had an Eighth Amendment right not only "to present," but to require the jury "to listen to," this testimony. *Sumner*, 483 U.S. at 76 (internal quotation marks omitted). And the jury was instructed to "consider and weigh" it, alongside all of the other mitigating evidence presented. Pet. App. 500.

Just as the testimony tended to make Jonathan appear *less* culpable, however, it tended to make Reginald appear *more* so. The testimony did not simply trace Jonathan's behavior to a difficult family history; it traced it to a family history made more difficult *by Reginald*. It thus suggested that Re-

ginald was responsible for the path Jonathan's life took—and that if Reginald had not been such a corrupting influence, Jonathan would not have ended up where he did. By its very nature, therefore, the testimony tended to *support* a death sentence for Reginald.

The question, then, is whether that testimony could have been considered against Reginald, if he had been sentenced alone. The answer is no. As the Kansas Supreme Court held, testimony that Reginald was a "corrupting influence" on Jonathan was "improper, nonstatutory aggravating evidence against [Reginald]." Pet. App. 411. That determination is dispositive. This Court has no authority to second-guess the Kansas Supreme Court's state-law determination that the evidence was "nonstatutory" and "improper." *See Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law * * * ").

In any event, the Kansas Supreme Court's determination was plainly correct. In Kansas, evidence may be considered against a capital defendant only if it tends to establish a statutory aggravator or rebut a proffered mitigator. *See* Kan. Stat. Ann. § 21-6617(c); *Kleypas*, 40 P.3d at 276. The testimony about Reginald's corrupting influence did neither.

To begin, the testimony was not relevant to any statutory aggravator. In Kansas, the only valid aggravating circumstances are those enumerated by statute; the prosecution may not seek to prove any others. *See* Kan. Stat. Ann. §§ 21-6617(c), 21-6624. In this case, the prosecution sought to prove four statutory aggravating circumstances: (1) that Reginald and Jonathan Carr knowingly or purposely

killed or created a great risk of death to more than one person; (2) that they committed murder for the purpose of receiving money or any other thing of monetary value; (3) that they committed murder to prevent lawful arrest or prosecution; and (4) that they committed murder in an especially heinous, atrocious, or cruel manner. Pet. App. 381-382, 502-503, 505-506. Each of these aggravating circumstances pertains to a specific aspect of the Carrs' crimes. None has to do with the brothers' family history or relationship with each other. So testimony that Reginald had a corrupting influence on his younger brother could not have been considered under the rubric of any statutory aggravator.

Nor could such testimony have been presented to rebut any mitigating circumstance. In Kansas, penalty-phase rebuttal is appropriate only when it contradicts mitigating evidence presented by the defendant. *See Kleypas*, 40 P.3d at 276-278; Pet. App. 437 ("Rebuttal evidence is that which contradicts evidence introduced by an opposing party." (internal quotation marks omitted)). Here, testimony that Reginald had a negative influence on Jonathan did not "refute or deny [any] affirmative fact" asserted by Reginald. Pet. App. 437 (internal quotation marks omitted). Reginald never suggested that he had a *positive* influence on Jonathan. Any testimony that he had a *negative* influence on him was therefore beyond the scope of rebuttal and "improper." *Id.* at 411.

If Reginald had been sentenced alone, the jury could never have considered any evidence that he had a corrupting influence on Jonathan; the prosecution would have never been allowed to present it. But in Reginald's joint proceeding with his younger

brother, Jonathan had a right to present such evidence, and the jury was required to "consider and weigh" it. *Id.* at 500. There was thus a substantial risk that the additional evidence colored the jury's deliberations, biasing the jury against Reginald in a way that would not have occurred if he had been sentenced alone. For Reginald, therefore, the evidence tilted the scales in favor of death, skewing the "weighing process itself." *Stringer*, 503 U.S. at 232.

C. Severance Was The Only Way To Ensure That The Weighing Process Would Not Be Skewed

1. Mere jury instructions could not have prevented the weighing process from being skewed. Jonathan had a constitutional right to require the jury to consider his evidence about Reginald's corrupting influence. And once the jury heard that evidence, there was nothing a court could do to prevent the jury from considering it against Reginald.

Even a limiting instruction would not have sufficed. In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court addressed the effectiveness of such instructions in a joint trial. One of the defendants in that case had given a confession inculpating both him and his codefendant. *Id.* at 124. The confession was admitted into evidence, and the jury was instructed to consider it only as to the defendant who had confessed. *Id.* at 125.

This Court held that such a limiting instruction was futile. "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.*

at 135. The Court concluded that a confession is one of those contexts.

> "In joint trials, * * * when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' * * * It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A."

Bruton, 391 U.S. at 131 (quoting *People* v. *Aranda*, 407 P.2d 265, 271-272 (Cal. 1965)).

The task is no less "overwhelming" when a jury is confronted with penalty-phase evidence like that in this case. The testimony that Reginald had a corrupting influence on his younger brother implicated Reginald by name, shifting moral culpability for the crimes directly to him. In the context of a capital sentencing proceeding—in which a defendant's moral culpability is the central issue—the testimony was just as "devastating" as the guilt-phase confession in *Bruton*. *Id.* at 136. Moreover, the testimony "was not amenable to orderly separation and analysis." Pet. App. 411. Rather, it was prejudicial to Reginald precisely because it was mitigating for Jonathan; those are simply two sides of the same coin. And so a jury told to consider the fact that Jonathan was

corrupted by Reginald could not simply ignore the inevitable conclusion that Reginald had a corrupting effect on Jonathan.

As the Kansas Supreme Court concluded, this is that "rare instance" in which jurors cannot be expected to segregate the evidence into separate intellectual boxes. *Id.* Even if the jury in this case had been told to consider the testimony only as to Jonathan, such an instruction would have been impossible to follow. Severance was the only way to avoid an Eighth Amendment violation.

2. In any event, the jury instructions in this case did nothing to address the Eighth Amendment problem.

According to Kansas (at 37-39), the instructions made clear that the jury should consider each defendant individually. One instruction, for example, told the jury: "You must give separate consideration to each defendant. Each is entitled to have his sentence decided on the evidence and law which is applicable to him." Pet App. 501. Another instruction spoke similarly in terms of an "individual" or "particular" defendant. *Id.* at 509. In addition, there were separate sets of verdict forms, one for Reginald and one for Jonathan. *See* 46 11/13/02 Tr. 128.

These measures might have prevented the jury from imputing evidence about just one brother to the other brother—*e.g.*, from applying evidence about just Jonathan to Reginald. But they did nothing to prevent the jury from applying evidence about *both* brothers to *each one*. When witnesses testified about Reginald's corrupting influence on Jonathan, that testimony was just as "applicable to" Reginald as it was to Jonathan; after all, the testimony concerned

Reginald's own conduct. And so by telling the jurors to decide each brother's sentence on the evidence "applicable to him," the instructions actually directed that such testimony be considered *against Reginald*—which is precisely the Eighth Amendment problem.

Another instruction stated: "Any evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant." Pet. App. 501. This instruction, however, could not cure the Eighth Amendment violation either, because the testimony about Reginald's corrupting influence was never "limited" to Jonathan. The jury was never told that the testimony should be considered only as to the younger brother. *Cf. Opper* v. *United States*, 348 U.S. 84, 95 (1954) (jury specifically told to disregard evidence as to one of the defendants); *United States* v. *Lane*, 474 U.S. 438, 442 (1986) (same).

Finally, the jury was told it "may consider only those aggravating circumstances set forth in this instruction"—an instruction listing the four aggravators proffered by the prosecution. Pet. App. 503. The testimony that Reginald had a corrupting influence on Jonathan fell outside those four statutory aggravators. So, according to Kansas (at 45 n.12) and the United States (at 29-30), a jury (at least one capable of following its instructions) would not have used that testimony as "improper aggravation."

But just because the testimony did not bear on any aggravating circumstance does not mean that the jury did not consider that testimony against Reginald. The instructions left the jury free to consider the evidence as rebutting Reginald's mitigation case.

As noted, Kansas limits such rebuttal to evidence that contradicts mitigating circumstances asserted by the defendant. *See supra* p. 21. But the jury was never told as much. Thus, although the testimony did not directly refute any mitigating circumstance asserted by Reginald, it still could have undermined the jury's willingness to give effect to his mitigating evidence. Indeed, there is no reason to think that the jury believed the testimony to be any different from all of the other anti-mitigation evidence presented during the penalty phase. *See infra* pp. 49-51. By encouraging the jury to remove weight from the mitigation side of the scale, the testimony skewed the process in favor of death as surely as an additional aggravator would have.

D. Kansas's And The United States' Counterarguments Lack Merit

1. According to Kansas (at 25), "the Kansas Supreme Court effectively established a *per se* rule requiring severance." Kansas's concern—shared by the United States (at 19-20 & nn.6 & 7)—is that if severance is required in *this* case, severance will be required in *every* case.

Not so. The rule that should govern this case is narrow: The Eighth Amendment requires severance when a joint penalty phase creates a substantial risk of skewing the jury's weighing process. That rule would not require severance in every case in which the defendants' mitigation defenses are antagonistic. Nor would it require severance in every case in which a defendant makes a plea for mercy.

A substantial risk of skewing was present in this case only because (1) Kansas limits what evidence can be considered against a capital defendant in the

weighing process and (2) Jonathan presented mitigating evidence that, when considered against Reginald, fell beyond those limits. That risk will not always exist when capital defendants are sentenced together.

Other jurisdictions might not impose the same limits on what evidence can be considered in the weighing process. Unlike Kansas, some jurisdictions allow jurors to weigh *any* aggravating circumstance they choose in deciding whether a death sentence is appropriate. *Zant*, 462 U.S. at 872. Others—including the Federal Government in proceedings under the Federal Death Penalty Act—allow the jury to weigh not only statutory but *nonstatutory* aggravating circumstances, which are up to the prosecution to define. 18 U.S.C. § 3592(c). And still other jurisdictions limit the jury to aggravating factors enumerated by statute, but include among them an *omnibus* factor, covering a broad range of circumstances. *Sanders*, 546 U.S. at 217. In other jurisdictions, therefore, a jury might have been *permitted* to consider against Reginald testimony about his family history and relationship with his younger brother. And in those jurisdictions, joinder would not have posed the same risk of skewing the weighing process as it did in Kansas.

Even within Kansas, joinder may be permissible in other capital cases. Typically, mitigation defenses are antagonistic because the defendants disagree about certain aspects of the crime. One defendant, for example, might want to suggest that his actions were not as "heinous, atrocious or cruel" as his codefendant's. Kan. Stat. Ann. § 21-6624(f). Such evidence, however, usually falls under the rubric of one of the statutory aggravating circumstances, and

so it may properly be considered against the codefendant without skewing the weighing process. This case is different because Reginald and Jonathan are brothers, with a long history predating the crimes at issue. And aspects of that history, when considered against Reginald, fall beyond the scope of any valid sentencing factor. Of course, not every case will involve antagonistic defenses of this kind, arising out of the "maelstrom" of a "joint upbringing." Pet. App. 411. And so requiring severance in the circumstances of this case would not necessarily foreclose joinder in others.

2. Kansas (at 33) and the United States (at 18-20) maintain that there are various benefits to joint penalty phases. But those benefits cannot trump a defendant's Eighth Amendment rights. As this Court recognized in *Bruton*, when the "benefits" of a joint proceeding come "at the price of fundamental principles of constitutional liberty," "[t]hat price is too high." 391 U.S. at 134-135 (internal quotation marks omitted). This Court reiterated the same point in *Zafiro* v. *United States*, 506 U.S. 534 (1992). There, the Court acknowledged that "[j]oint trials play a vital role in the criminal justice system." *Id.* at 537 (internal quotation marks omitted). But at the same time, it made clear that severance should be granted whenever "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants." *Id.* at 539. That is the case here: The joint penalty phase compromised Reginald's Eighth Amendment rights. Whatever benefits a joint penalty phase may have promised, the Constitution required severance.

In any event, Kansas and the United States have overstated the benefits of a joint penalty phase in

this case. They contend that a joint proceeding served the interest of fairness by avoiding "inconsistent verdicts." U.S. Br. 18 (internal quotation marks omitted); *see also* Kan. Br. 33. But Kansas—like many jurisdictions—avoids inconsistent verdicts by channeling the jury's discretion in the weighing process. *Sanders*, 546 U.S. at 216. And here, joinder served only to skew that weighing process, by requiring the jury to consider evidence against Reginald that the prosecution could not present. Subjecting Reginald to an additional prosecutor (his own brother) who could (and did) present such evidence was hardly fair. And doing so indubitably tilted the scales for Reginald in favor of death—"creat[ing]," rather than removing, "the possibility of * * * randomness." *Stringer*, 503 U.S. at 236.

Kansas (at 33) and the United States (at 26) also argue that a joint penalty phase served the interest of accuracy by affording jurors a "more complete view" of the evidence. (Internal quotation marks omitted.) But in Kansas—as in other jurisdictions—accuracy is defined not in a vacuum, but rather in terms of the sentencing factors a jury may consider in the weighing process. And given those factors in Kansas, the only evidence that may properly be considered against a capital defendant is evidence that tends to establish a statutory aggravator or rebut a proffered mitigator. In this case, joinder forced the jury to consider evidence against Reginald that did neither. And because that evidence did not pertain to any valid sentencing factor for Reginald, it cannot be said to have promoted the accuracy of Reginald's sentence.

Finally, Kansas and the United States contend that joinder serves the interest of efficiency by avoiding

the "duplication of resources." U.S. Br. 19; *see also* Kan. Br. 33. Severance, however, requires only that the defendants are sentenced in separate proceedings. And there are ways of keeping the proceedings separate without too great a burden. One way would be to impanel two juries, one for each defendant, that would hear the guilt phase together and then part ways at the penalty phase. That would avoid the need to present the guilt-phase evidence twice. *See, e.g.*, *United States* v. *Hayes*, 676 F.2d 1359, 1366-1367 (11th Cir. 1982).[2] Another way would be to allow one jury to hear everything, but to conduct the defendants' penalty phases separately and sequentially. That would prevent the defendant whose penalty phase the jury heard first from being prejudiced by the evidence of the defendant whose penalty phase the jury heard second. *See, e.g.*, *United States* v. *Lee*, 274 F.3d 485, 488-489 (8th Cir. 2001).

What a jurisdiction may *not* do is refuse to sever the penalty phase when there is a substantial risk that joinder will skew the weighing process for a defendant. Because that is what Kansas did here, the Eighth Amendment requires new, separate penalty-phase proceedings—no matter the benefits of joinder.

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[2]In fact, the prosecution suggested such a two-jury solution before the start of the defendants' trial. Pet. App. 126-127. Reginald opposed it, arguing that nothing short of two entirely separate trials would suffice. 77 Appellate Record 04/23/02 Tr. 63-66. But that should not foreclose a two-jury solution in other cases.

E. The Constitutional Error Is Not Harmless

Kansas argues (at 49) that even if the refusal to sever violated the Eighth Amendment, the violation was harmless. To prevail, Kansas must carry a heavy burden: It must prove that the violation "was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

1. Applying that standard, the Kansas Supreme Court held that the refusal to sever was not harmless. Pet. App. 413. This Court has never once in a capital case reversed a determination that a constitutional error was not harmless under *Chapman*. And there is no reason for this Court to second-guess the Kansas Supreme Court's harmless-error analysis here.

"Undertaking a harmless-error analysis is perhaps the least useful function that this Court can perform." *Lane*, 474 U.S. at 476 (Stevens, J., concurring in part and dissenting in part). "This Court is far too busy to be spending countless hours reviewing trial transcripts in an effort to determine the likelihood that an error may have affected a jury's deliberations." *United States* v. *Hasting*, 461 U.S. 499, 516-517 (1983) (Stevens, J., concurring in the judgment). Accordingly, the fact-bound question whether an error was harmless is "[n]ormally" one "more appropriately left to the courts below." *Connecticut* v. *Johnson*, 460 U.S. 73, 102 (1983) (Powell, J., dissenting).

Further proceedings would be necessary anyway, regardless of the outcome of this Court's harmless-error review. After all, the Kansas Supreme Court identified several other penalty-phase errors, in addition to the refusal to sever. One of those errors

is under review in the other question presented, and Kansas has not challenged the Kansas Supreme Court's conclusion that any error in the jury instructions was not harmless. Pet. App. 446. Thus, if this Court agrees that the instructions violated the Eighth Amendment, the question whether the refusal to sever was harmless would be moot. As for the remaining errors—including a Confrontation Clause violation as to which Kansas unsuccessfully petitioned for certiorari—the Kansas Supreme Court reserved judgment on whether they were harmless when viewed on their own, as well as whether they were harmless when viewed cumulatively. *Id.* at 377-379. Thus, even if this Court were to conclude that the refusal to sever, standing alone, was harmless, further proceedings would be required for the Kansas Supreme Court to address these other questions.

2. In any event, Kansas has not met its burden of proving that the refusal to sever was harmless. In attempting to do so, Kansas (at 49-53) focuses only on the strength of the aggravating evidence regarding the circumstances of the crimes. But that is only one side of the scale. As instructed, the jury could sentence Reginald to death only if Kansas proved beyond a reasonable doubt that the aggravating circumstances "outweigh[ed] [the] mitigating circumstances found to exist." Pet. App. 501, 509.

Here, the mitigating evidence for Reginald was substantial. As noted, Reginald suffered "severe" "developmental traumas" while growing up. 43-A 11/07/02 Tr. 85. Starting at a young age, he was exposed to intense and inappropriate sexual conduct. *See* 41-A 11/05/02 Tr. 95 (experimented with sex in elementary school); 41-B 11/05/02 Tr. 15, 101 (en-

gaged in sex as a child with an 8-year-old girl); 43-A 11/07/02 Tr. 57 (engaged in sex play with children his mother was babysitting); *id.* at 65 (discovered pornographic photos of his mother and stepfather); 45-B 11/12/02 Tr. 151 (engaged in sex as a child with his 7-year-old cousin); 46 11/13/02 Tr. 6-7 (same). Reginald was subjected to physical violence. *See* 41-A 11/05/02 Tr. 70-71 (beat with a belt or electrical cord); *id.* at 108-109 (shot with a BB gun in the head); 44 11/08/02 Tr. 14 (knocked out in fights). And Reginald was surrounded by criminal activity. *See* 41-A 11/05/02 Tr. 94 (drug sales); 41-B 11/05/02 Tr. 82-83 (cousin Eric shot and killed, execution-style); 43-A 11/07/02 Tr. 54-55 (drug sales). Amidst all this, Reginald had no one to turn to. His father was sexually abusive, drank heavily, and abandoned Reginald when he was 10. 41-A 11/05/02 Tr. 50, 52-53, 80-81; 41-B 11/05/02 Tr. 68, 71, 74; 43-A 11/07/02 Tr. 64, 73-74; 43-B 11/07/02 Tr. 103. His mother neglected Reginald, "whipp[ed]" him, and abused drugs. 41-A 11/05/02 Tr. 70, 73; 41-B 11/05/02 Tr. 72-77; 43-A 11/07/02 Tr. 56, 60, 70; 45-B 11/12/02 Tr. 143, 146-148. By age 5, Reginald had developed antisocial personality disorder. 44 11/08/02 Tr. 41-42. And by age 9, he had suffered brain damage from "significant head trauma." *Id.* at 45-46.

In light of this record, the refusal to sever was not harmless beyond a reasonable doubt. That refusal caused the jury to consider evidence that it otherwise would not have—testimony that Reginald had a corrupting influence on Jonathan. And that testimony was powerful: It suggested that Reginald had turned his younger brother into a murderer and ruined his life. The jury thus entered the weighing

process with the scales already tilted against Reginald.

One cannot say—and Kansas certainly has not proven beyond a reasonable doubt—that this thumb on death's side of the scale "'did not contribute to the verdict obtained.'" *Satterwhite* v. *Texas*, 486 U.S. 249, 258-259 (1988) (quoting *Chapman*, 386 U.S. at 24). Without the testimony that Reginald corrupted his younger brother, there is at least a reasonable possibility that one of the dozen jurors would have concluded that Kansas had not proven beyond a reasonable doubt that the aggravating circumstances "outweigh[ed] [the] mitigating circumstances found to exist." Pet. App. 501, 509. And "mercy from a single juror is all it takes to send a capital defendant to prison rather than to execution." *Id.* at 409. Because the refusal to sever was not harmless, the Kansas Supreme Court correctly held that Reginald is entitled to a new, separate penalty phase.[3]

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[3]The jury heard other testimony prejudicial to Reginald, also elicited by Jonathan's attorney, that Temica recalled Reginald telling her that "he was the one that shot those people," 41-B 11/05/02 Tr. 90—something that Reginald insists never happened. Although the jury's consideration of Temica's testimony did not itself violate the Eighth Amendment, it should still figure into this Court's harmless-error analysis. That is because if Reginald had been sentenced alone, the prosecution likely would not have introduced any such testimony; indeed, there is no indication that the prosecution was even aware of Temica's supposed recollection before she testified. Moreover, as the Kansas Supreme Court explained, Temica's testimony was highly prejudicial because it made the jury far less inclined to show mercy toward Reginald. Pet. App. 410.

II. THE AMBIGUOUS JURY INSTRUCTIONS VIOLATED THE EIGHTH AMENDMENT

Unconstitutional skewing was not the only defect that plagued Reginald Carr's sentencing. The penalty phase was also marred by ambiguous jury instructions that suggested to the jury that the defendants bore the burden of proving mitigating circumstances beyond a reasonable doubt.

These ambiguous instructions violated the Eighth Amendment for two independent reasons. First, they ran afoul of the Eighth Amendment's mandate that a jury must be able to consider and give effect to all of a defendant's mitigating evidence, in order to ensure reliable, individualized sentencing. And second, they cannot be reconciled with the Eighth Amendment's requirement that the instructions governing the weighing process be precise enough to avoid the risk of randomness and bias in favor of the death penalty.

A. The Eighth Amendment Bars Jury Instructions That Impose A Reasonable Doubt Standard On Mitigating Evidence

It is "firmly established" that a capital jury must have the ability to "give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246 (2007). Jury instructions that require a defendant to prove mitigating circumstances beyond a reasonable doubt violate that rule because they prevent the jury from giving effect to any evidence associated with a mitigating

circumstance that has not been proven to an "utmost certainty." *In re Winship*, 397 U.S. 358, 364 (1970). Because there is a "reasonable likelihood" that the jury would have interpreted the instructions in this case to impose such an impermissibly high standard, the instructions are flatly incompatible with the Eighth Amendment. *Boyde* v. *California*, 494 U.S. 370, 380 (1990).

1. A reasonable doubt standard unconstitutionally precludes a jury from giving meaningful effect to mitigating evidence

The Eighth Amendment mandates that the imposition of the death penalty "should be directly related to the personal culpability of the criminal defendant." *Penry I*, 492 U.S. at 319. For that reason, a sentencing jury must have the ability to decide whether mitigating circumstances exist that render the death penalty inappropriate for a particular defendant. *See, e.g.*, *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion).

A State has some latitude in whether and how it structures the jury's consideration of mitigating evidence. Thus, in determining whether a defendant who is eligible for the death penalty should in fact receive it, a jury may simply be told to consider "all facts and circumstances presented in extenuation, mitigation, and aggravation of punishment." *Zant*, 462 U.S. at 889 n.25. Or, the jury may explicitly be asked to weigh the mitigating circumstances against the aggravators. And, if the State does require weighing, it may decide whether death is appropriate only when the aggravating circumstances outweigh the mitigators, or whether it is sufficient that the

aggravators and mitigators are in equipoise. *See Marsh*, 548 U.S. at 173-175.

But a State's discretion is not limitless. Reliable, individualized sentencing depends on a jury's ability to give "independent weight" to any information that counsels against sentencing a defendant to death. *Lockett*, 438 U.S. at 605 (plurality opinion). Thus, the Eighth Amendment bars jury instructions that deprive the jury of the power to give "meaningful effect to any mitigating evidence providing a basis for a sentence of life rather than death." *Abdul-Kabir*, 550 U.S. at 260.

For example, in *Penry I*, the Court invalidated a death sentence handed down under Texas' former "Special Issues" sentencing scheme because the instructions "preclud[ed] the jury from acting upon the particular mitigating evidence [Penry] introduced." 492 U.S. at 320. The Court in *Penry I* explained that the Texas sentencing scheme asked the jury to answer three sentencing questions, none of which permitted the jury to "express its reasoned moral response to" the evidence Penry had offered in mitigation. *Id.* at 322. Following this holding, the Court has invalidated several other death sentences issued under the Texas scheme, where the defendant has demonstrated that the instructions prevented the jury from giving "meaningful effect" to some evidence presented in mitigation. *See, e.g. Brewer* v. *Quarterman*, 550 U.S. 286 (2007); *Abdul-Kabir*, 550 U.S. 233; *Tennard* v. *Dretke*, 542 U.S. 274 (2004); *Penry* v. *Johnson*, 532 U.S. 782 (2001) (*Penry II*).

By the same token, the Court has found an Eighth Amendment violation where jury instructions may be read to require a jury to unanimously find a mitigat-

ing circumstance before weighing it against the aggravators. *See Mills* v. *Maryland*, 486 U.S. 367, 373-375 (1988); *McKoy* v. *North Carolina*, 494 U.S. 433, 439-440 (1990). As the *McKoy* Court explained, the unanimity requirement is impermissible because unless the jury is in agreement on the existence of a mitigating circumstance, the jurors are precluded "from giving effect to evidence [related to the circumstance] that they believe calls for a 'sentence less than death.'" 494 U.S. at 439.

Jury instructions that impose a reasonable doubt standard on mitigating circumstances have precisely this forbidden result. Applying such instructions, a juror will weigh a mitigating circumstance against the aggravators only if the juror believes that the circumstance has been proven beyond a reasonable doubt. That is an exceedingly high burden, typically imposed only on the *state* in order to ensure certainty in prosecution and punishment. And yet, if the juror does not find that high burden met, he or she may give *no* effect to the evidence the defendant has submitted in support of that circumstance.

That turns the purpose of the reasonable doubt standard on its head. The standard was developed "to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property," by ensuring that the existence of any doubt favors the defendant. *Brinegar* v. *United States*, 338 U.S. 160, 174 (1949). But imposing the reasonable doubt standard on mitigating circumstances means that any doubt will favor the state, prompting the jury to disregard evidence that might otherwise have dictated a verdict of life. And because the failure to give effect to this evidence "risks erroneous imposition of the death sentence," it

cannot be tolerated under the Eighth Amendment. *Mills*, 486 U.S. at 375 (internal quotation marks omitted).

That is not to say that a jury must give weight to *any* mitigating circumstance a defendant asserts, no matter how preposterous or unbelievable that circumstance may be. A State may establish minimum standards to ensure that the mitigating evidence a defendant offers is relevant and credible. For example, in *Tennard*, this Court acknowledged that evidence may be screened out on relevance grounds if it is "unlikely to have any tendency to mitigate the defendant's culpability." 542 U.S. at 286-287; *see also Skipper* v. *South Carolina*, 476 U.S. 1, 7 n.2 (1986) ("We do not hold that all facets of the defendant's ability to adjust to prison life must be treated as relevant * * * [W]e have no quarrel with the statement * * * that 'how often [the defendant] will take a shower' is irrelevant to the sentencing determination."). And in *Walton* v. *Arizona*, 497 U.S. 639 (1990), the Court held that a State may require a defendant to prove the existence of mitigating circumstances by a "preponderance of the evidence." *Id.* at 649-651 (plurality opinion).

But the Court has also emphasized that the minimum standards imposed by a State cannot be stringent. Indeed, while the *Tennard* Court accepted that evidence may be screened based on relevance, it held that this must be a "low threshold." 542 U.S. at 285. As this Court later reiterated, "the jury must be given an effective vehicle with which to weigh mitigating evidence so long as" that evidence "'tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to

have mitigating value.'" *Smith* v. *Texas*, 543 U.S. 37, 44 (2004) (quoting *Tennard*, 542 U.S. at 284-285).

Similarly, the "preponderance of the evidence" standard that the Court approved for mitigating circumstances in *Walton* "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). Thus, instructing a jury on the "preponderance of the evidence" standard simply reinforces the commonsense notion that a juror need not give effect to a mitigating circumstance if she thinks it probably does not exist. But the instructions may not go further, preventing a juror from giving effect to mitigating circumstances she thinks probably *do* exist. *See, e.g.*, *Abdul-Kabir*, 550 U.S. at 259 (rejecting assertion that mitigating evidence need not be given meaningful effect if it is less "persuasive" than that at stake in *Penry I*); *Brewer*, 550 U.S. at 294 (rejecting similar attempt to permit mitigating circumstance to have no effect on the ground that it was unsupported by expert testimony).

A requirement that mitigating circumstances must be proved beyond a reasonable doubt clearly goes too far in that direction. A reasonable doubt standard requires a jury to be convinced that a circumstance exists to an "utmost certainty" before giving it any mitigating weight. *Winship*, 397 U.S. at 364. Such a standard will inevitably and impermissibly preclude

a jury from weighing evidence that would otherwise counsel against death.[4]

Contrary to Kansas's late-breaking attempt (at 58-60) to recharacterize the proceedings, this case provides a perfect illustration of the problem. To cite just one example: Reginald Carr elicited extensive testimony regarding his father's abandonment and sexually abusive behavior. *See, e.g.*, 41-A 11/5/02 Tr. 47, 51-55, 80-81; 41-B 11/05/02 Tr. 67-68, 71, 74; 43-A 11/07/02 Tr. 64, 73-74. But during cross-examination, the State represented that Reginald's father—who did not testify—had denied much of this account. 43-A 11/07/02 Tr. 90-93; 43-B 11/07/02 Tr. 34. If his father's denial injected any reasonable doubt about Reginald's troubled childhood, then the jury could not weigh this family background as a mitigating circumstance. The relevant testimony

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[4]In *Walton*, the defendant made both an Eighth Amendment and a due process argument that the State was prohibited from imposing even a preponderance standard on mitigating circumstances. In rejecting these arguments, the *Walton* plurality cited a number of cases holding that the Due Process Clause permits a State to place the burden on the defendant with respect to some aspects of a capital case. One of those cases, *Leland* v. *Oregon*, 343 U.S. 790 (1952), involved a statute that required capital defendants to prove a defense of insanity "beyond a reasonable doubt." But *Leland* did not involve the penalty phase, and thus did not implicate the Eighth Amendment's bar on undue restrictions on mitigating evidence. And the *Walton* plurality made clear that its holding was not in tension with *Mills*, the sole Eighth Amendment precedent underlying its analysis, because its holding was merely that a State may require each juror to "be convinced * * * that the mitigating circumstance has been proved by *a preponderance of the evidence*." *Walton*, 497 U.S. at 650-651 (plurality opinion) (emphasis added).

Reginald presented—detailing his father's disturbing behavior—would therefore have been deprived of any effect in his sentencing.

The very nature of mitigation evidence means that this sort of outcome will be typical. Defendants frequently rely on family testimony about a difficult upbringing that is subject to contradiction by other family members whose negative behavior is implicated. Moreover, the sort of intimate relationship that makes a witness a prime source of mitigating evidence regarding a defendant's background and character will also give rise to credible accusations of bias. That will make it extremely difficult for defendants to meet the reasonable doubt burden. Indeed, in this case, the State repeatedly suggested that Reginald's expert witnesses could not be credited because they relied on the biased accounts of family members. *See, e.g.*, 46 11/13/02 Tr. 190.

The reasonable doubt standard leads to a further, paradoxical result: A defendant may produce extensive mitigating evidence that suggests the existence of several strongly mitigating factors. And the jury may believe that *all* of those mitigating circumstances probably exist. But unless the defendant's evidence proves one or more of the circumstances beyond a reasonable doubt, the jury will have *nothing* to weigh against the aggravators, making a death sentence inevitable. That arbitrary result is anathema to the Eighth Amendment. Indeed, this Court has explained that it is the "height of arbitrariness" to "require the jury to impose the death penalty" even though the majority of jurors believe that the mitigating evidence counsels in favor of life. *Mills*, 486 U.S. at 374, 384; *see also McKoy*, 494 U.S. at 453-454 (Kennedy, J., concurring in the judgment)

(discussing the "extreme arbitrariness" of such a rule).

Finally, it is significant, particularly in light of the Eighth Amendment's prohibition on "cruel and *unusual*" punishment, that *no* State requires a defendant to prove mitigating circumstances beyond a reasonable doubt. As the Kansas Supreme Court held, the instructions in this case were out of step with Kansas's own law, which imposes no burden on mitigating circumstances.[5] When every State recognizes a limit on the burden that can be placed on a capital defendant's mitigating circumstances, there can be no doubt that a higher burden of proof violates the Eighth Amendment. *Cf. Kennedy* v. *Louisiana*, 554 U.S. 407, 426 (2008) ("evidence of a national consensus with respect to the death penalty" supports a conclusion that a sentencing practice violates the Eighth Amendment).

2. *The instructions were reasonably likely to cause jurors to apply a reasonable doubt standard to mitigating circumstances*

Kansas makes no real attempt to defend the constitutionality of a reasonable doubt standard. Indeed, it never disputes that such a standard would prevent

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[5]This holding provides an adequate and independent state ground for the Kansas Supreme Court's invalidation of the instructions. This Court may therefore eschew a federal constitutional holding to avoid the risk of producing an advisory opinion. *See, e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983).

juries from giving meaningful effect to mitigating evidence.[6]

The only genuine dispute concerns the particular instructions in this case. To show that penalty-phase jury instructions violate the Eighth Amendment, a defendant need establish only "a *reasonable likelihood* that the jury has applied the challenged instruction[s] in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380 (emphasis added). That is a low burden—somewhere between possible and probable. *Id.* It is easily met in this case.

1. Consider the language of the instructions. The instructions repeatedly directed the jury to weigh those "mitigating circumstances *found* to exist" or "*shown* to exist." Pet. App. 501-502, 509 (emphases added); *see also id.* at 504, 507 ("found"). This implied that not all mitigating circumstances should be weighed—only those "found" or "shown to exist." And so the question becomes: When does a mitigating circumstance rise to that level?

Throughout the pages of jury instructions, there was reference to just one evidentiary standard: proof

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[6]Kansas (at 55) does point to *Marsh*'s statement that States are "free to determine the manner in which a jury may consider mitigating evidence." But Kansas also acknowledges (at 54-55) that jury instructions cannot "prevent juries from considering relevant mitigation." And Kansas makes no attempt to demonstrate that a reasonable doubt standard lacks this impermissible effect. *Marsh* is unhelpful in any event. The decision holds only that a State may require that mitigating circumstances outweigh the aggravators; it says nothing about the burden of proof that a defendant must meet to ensure that his mitigating evidence is considered at all.

beyond a reasonable doubt. The instructions repeated that standard a whopping *nine* times. *Id.* at 501, 504, 507, 509. Indeed, that reasonable doubt standard appeared in *every* instruction referencing the mitigating circumstances to be "found" or "shown." *Id.* at 501 (Instruction No. 4), 504 (Instruction No. 6), 507 (Instruction No. 8), 509 (Instruction No. 10).

What is more, the instructions repeatedly juxtaposed mitigating circumstances with aggravating circumstances, suggesting that the standard of proof was the same for both. For example, Instruction No. 4 read:

> The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist.
>
> In making the determination whether aggravating circumstances exist that outweigh mitigating circumstances found to exist, you should keep in mind that your decision should not be determined by the number of aggravating or mitigating circumstances that are shown to exist.

Id. at 501-502. In the last sentence of this instruction, the phrase "shown to exist" applies interchangeably to "aggravating" and "mitigating circumstances"—indicating that the standard for when they are "shown" is the same. Instruction No. 10 suggested the same sort of equivalence: It referred, in parallel fashion, to both "mitigating circumstances found to exist" and "aggravating circumstances * * * found to exist." *Id.* at 509; *see also* 46 11/13/02 Tr. 124 (Verdict Form No. 1) (same). And Instruction No. 2 referred to the two types of circumstances together

as well, implying that they should be "consider[ed] and weigh[ed]" in the same way. Pet. App. 500.

These instructions suggested that any "circumstance"—whether mitigating or aggravating—must be "found" or "shown" by the same standard: proof beyond a reasonable doubt. And when one turns to the instructions that specifically concern aggravating circumstances—Instruction Nos. 5 and 7—there is absolutely no indication to the contrary; those instructions do not even mention the reasonable doubt standard at all, let alone clarify that it applies exclusively to aggravating circumstances. These ambiguities created a reasonable likelihood that the jury applied a reasonable doubt standard to mitigating circumstances.

Kansas is unable to point to any language that removes that likelihood. It cites (at 56-57) language stating that mitigating circumstances are "to be determined by each individual juror," and that they can be "any * * * factor which you find may serve as a basis for imposing a sentence of less than death." Pet. App. 504-505. But those instructions are about the *what*, not about the *how*. They told the jury that it could decide *what kinds* of facts qualify as mitigating. But they did not explain *how* the jury should go about finding those facts. In other words, those instructions told the jurors to decide for themselves whether a particular fact—such as the fact of having been subjected to abuse as a child—was the sort of fact that might make Reginald less deserving of the death penalty. *See id.* at 504 ("The determination of *what* are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case." (emphasis added)). But they did nothing to explain to the jury how it should decide whether

Reginald had established that fact of abuse in the first place. The only guidance on that question came in the form of many repeated references to the reasonable doubt standard.

In short, it is reasonably likely that the jury understood the instructions to require proof of mitigating circumstances beyond a reasonable doubt. Of course, that is not the only plausible reading of the instructions. *See Boyde*, 494 U.S. at 380-381 (recognizing that jurors and lawyers might "pars[e]" instructions differently). But given the ambiguous language of the instructions, there is at least a reasonable likelihood that jurors "believed they could not consider mitigating circumstances not proven beyond a reasonable doubt." *Gleason* Pet. App. 102.

2. The "context of the proceedings" only increased the likelihood that the instructions would be applied in an unconstitutional way. *Boyde*, 494 U.S. at 383.

Statements by the prosecution reinforced the impression that a reasonable doubt standard applied to mitigating circumstances, and that the defendants bore the burden of meeting it. During opening statements, for example, the prosecution told the jury that "mitigators" were up to "the defendants" to "choose *to prove* to show or lessen or to change any culpability under the death penalty statute." 41-A 11/05/02 Tr. 10-11 (emphasis added). Later in the proceedings, the prosecution even implied a certain symmetry between the guilt and penalty phases. It explained that when "evidence * * * came in in the guilt phase," the "defense lawyers [could] get up and say where did that come from, what does it mean, challenge the evidence." 43-A 11/07/02 Tr. 92. And the prosecution suggested that it was simply doing

the same thing by pointing out that Reginald's and Jonathan's father "den[ied] much of the information that has been provided to [Dr. Reidy]." *Id.* The prosecution's analogy to the guilt phase suggested that the prosecution and the defense had reversed roles—which would mean, in the penalty phase, that the jury should hold the defendants to a reasonable doubt standard.

Kansas does not account for any of this. Instead, it points to statements by attorneys regarding the jury's discretion to decide *what kinds* of facts qualify as mitigating. *See* Kan. Br. 58 (quoting 41-A 11/05/02 Tr. 12, 28, 29); *id.* at 60 (quoting 46 11/13/02 Tr. 134). But again, such statements say nothing about how the jury should go about finding those facts. *See supra* p. 46-47. Kansas also points to statements by attorneys regarding the jury's discretion to decide *what weight* a mitigating circumstance, once found, should be given. *See* Kan. Br. 58 (quoting 41-A 11/05/02 Tr. 28); *id.* at 61 (quoting 46 11/13/02 Tr. 150, 172). Those statements, too, are beside the point. They say nothing about how a jury should decide that such a circumstance has been found in the first place.

Finally, Kansas contends (at 58) that it "did not vigorously contest the existence of most of the mitigating circumstances presented." But what evidence the prosecution did or did not contest is not relevant to the inquiry at all. In *Boyde*, the evidence presented was relevant only because of the particular issue in that case: whether the jury was misled to believe that it could not consider mitigating evidence relating to the defendant's background and character. 494 U.S. at 381. The fact that the defense introduced "volumes" of precisely such evidence without

objection suggested that the jury would in fact have understood that it could consider it. *Id.* at 384. But the issue in this case is not whether the jury understood that it could consider a particular *kind* of mitigating evidence. The issue is whether it understood that it could consider mitigating evidence unconstrained by any burden of proof. And what evidence the defendants presented, and the extent to which the prosecution challenged it, say nothing about whether the jury properly understood that mitigating circumstances need not be proven beyond a reasonable doubt.

In any event, it is flatly wrong for Kansas to say (at 59-60) that the "only real point of contention regarding the evidence was the claim made by both Reginald and Jonathan that they had demonstrable brain abnormalities." On the contrary, the prosecution sought to cast doubt on the defendants' evidence at every turn.

For example, after their older sister Temica testified that their mother Janice had abused and neglected the defendants as children, *see* 41-B 11/05/02 Tr. 72-77, the prosecution elicited testimony from Janice's sister that the children seemed fine. 43-B 11/07/02 Tr. 79, 109. After Janice testified that Reginald's and Jonathan's father had abandoned the family, 41-A 11/05/02 Tr. 53, 80-81, the prosecution openly questioned whether he had abandoned Reginald in particular. 46 11/13/02 Tr. 188. And after Temica testified that their father had sexually abused her, 41-B 11/05/02 Tr. 74, the prosecution elicited testimony from her aunt that Temica did not show "signs of abuse" or "fit a profile of a child who has, you know, been sexually abused." 43-B 11/06/02 Tr. 81-82, 86; *see also id.* at 83, 104.

In addition, the prosecution attacked the factual basis for the testimony of two of Reginald's experts: Dr. Reidy and Dr. Woltersdorf. Relying on interviews with Reginald, Temica, and other family members, Dr. Reidy testified extensively about the impact Reginald's childhood and upbringing had on his propensity to engage in criminal behavior. The prosecution sought to rebut that testimony by cross-examining Dr. Reidy on the credibility of his sources, suggesting that because "most of what [he] learned about Reggie" came from "self-reporting and statements of people," there was no way to "know if it's true or not." 43-A 11/07/02 Tr. 88; *see also id.* at 105 ("[E]verything that [Reginald] could have told you could be absolutely and totally false and incorrect?"); 43-B 11/07/02 Tr. 24 ("[Y]ou would expect people to lie sometimes or not tell the truth to avoid consequences?"). The prosecution reiterated that point during closing arguments, accusing Dr. Reidy of relying on the "biased accounts" of family members without making any "attempt to independently verify" them. 46 11/13/02 Tr. 190. It also questioned specific facts recounted by Dr. Reidy—including whether Reginald's father sexually abused Temica. 43-A 11/07/02 Tr. 90 ("Would it surprise you that he denies ever sexually molesting his daughter?"); *id.* at 92 ("[Reginald's father] den[ies] much of the information that has been provided to you"); 43-B 11/07/02 Tr. 34 ("We've already covered the fact that * * * that may be absolutely false.").

The prosecution similarly challenged the foundation for Dr. Woltersdorf's testimony. After Dr. Woltersdorf testified that Reginald had suffered "significant head trauma with a number of knockouts" during "the first eight, nine years of life," 44

11/08/02 Tr. 45-46, the prosecution questioned whether that was in fact true. *See id.* at 78 ("[Y]ou were not provided with documentation of these head injuries where he said he lost consciousness?"). And it suggested that Reginald had "crafted [his] social history" to make his childhood appear worse than it really was. *Id.* at 77-78.

Thus, although Kansas insists (at 58) that it "did not vigorously contest the existence of most of the mitigating circumstances presented," the record tells a very different story. The prosecution relentlessly challenged evidence central to Reginald's mitigation case. And by doing so, the prosecution exacerbated the risk that jurors would disregard much of that evidence on the ground that it was not proven beyond a reasonable doubt. Because there is a reasonable likelihood that the jury applied the instructions in an unconstitutional way, the instructions violate the Eighth Amendment.

3. None of the cases that Kansas cites undermines this conclusion.

In *Buchanan* v. *Angelone*, 522 U.S. 269 (1998), the Court reaffirmed the principle "that restrictions on the jury's sentencing determination [should] not preclude the jury from being able to give effect to mitigating evidence." *Id.* at 276. The Court went on to hold that the particular jury instruction in that case did not violate that principle. *Id.* at 277. But the defendant never argued that the instruction could be understood to require proof of mitigating circumstances beyond a reasonable doubt. *See id.* at 275. So the Court had no occasion to address the question presented here.

In any event, the instruction in *Buchanan* differed materially from the instructions here. The instruction in *Buchanan* distinguished between two separate phases in the jury's deliberations. In the eligibility phase, jurors had to consider whether the prosecution "prove[d] beyond a reasonable doubt that [the defendant's] conduct * * * was outrageously or wantonly vile, horrible or inhuman." *Id.* at 272 n.1. If the prosecution passed that threshold, the jury proceeded to the selection phase, in which it could sentence the defendant either to death or, "if [it] believe[d] from all the evidence that the death penalty is not justified," to life in prison. *Id.* Thus, unlike the instructions in this case, the instruction in *Buchanan* made clear that the reasonable doubt standard applied only in the eligibility phase. And in describing the selection phase, the instruction nowhere mentioned the term "mitigating circumstance," let alone suggested that such a circumstance had to be "found" or "shown to exist" before the jury could sentence the defendant to life imprisonment.

Weeks v. *Angelone*, 528 U.S. 225 (2000), is similarly inapposite. As in *Buchanan*, the Court in *Weeks* did not address whether the jury instructions could be understood to require proof of mitigating circumstances beyond a reasonable doubt. Moreover, the instructions in *Weeks* were the same as in *Buchanan*, with one addition: an instruction on mitigating evidence, which told the jurors to "consider a mitigating circumstance if you find there is evidence to support it." *Weeks*, 528 U.S. at 232 n.2. That additional language simply clarified that the jury could consider a mitigating circumstance if the defendant produced evidence to support one—a burden of *production*, not proof. *See Buchanan*, 522 U.S. at

283-284 (Breyer, J., dissenting) (noting the possibility of confusion without such language). It was still clear that the reasonable doubt standard applied only in the eligibility phase. *See Weeks*, 528 U.S. at 229 n.1.[7]

Kansas's reliance on three state-court decisions is also misplaced. In *Matheney* v. *State*, 688 N.E.2d 883 (Ind. 1997), Indiana's highest court explained that "'preponderance of the evidence' is the appropriate standard for determining mitigating circumstances" in that State. *Id.* at 902. The court then held that "the absence of an instruction so stating, *without more*, does not *necessarily* suggest to jurors that mitigating circumstances need be proven beyond a reasonable doubt." *Id.* (emphases added). That unremarkable holding says nothing about this case, where it was not just the absence of such an instruction but the "specific" language of the instructions given that would "lead a jury to such a misunderstanding." *Id.*

Nor can Kansas find support in *Dawson* v. *State*, 637 A.2d 57 (Del. 1994). The Delaware Supreme Court held that the particular instructions in that case did not create a reasonable likelihood that the jurors applied a reasonable doubt standard to mitigating circumstances. Those instructions distinguished (1) "statutory aggravating circumstances

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[7] *Smith* v. *Spisak*, 558 U.S. 139 (2010), is even farther afield. That case involved a habeas claim under *Mills*, asserting that jurors were led to believe they could consider only those mitigating circumstances *unanimously* found. The Court's opinion held only that—under stringent standards of habeas review—the instructions "did not clearly bring about" the same juror unanimity error present in *Mills*. *Smith*, 558 U.S. at 148.

* * * *found to exist* beyond a reasonable doubt" from (2) non-statutory aggravating circumstances "which *may exist*" from (3) "any mitigating circumstances which [the defense] *contends exists*." *Id.* at 65 (emphases altered). It was therefore clear that the burden of proof applied only to statutory aggravating circumstances—the only circumstances that had to be "found to exist." The instructions here, by contrast, used the phrase "found to exist" in referring to aggravating and mitigating circumstances alike—suggesting that the reasonable doubt standard applied to both.

Finally, the California Supreme Court's discussion of the issue in *People* v. *Welch*, 976 P.2d 754 (Cal. 1999), consisted of only a single sentence: "[B]ecause the trial court instructed specifically that the reasonable doubt standard applied * * * to aggravating factors, and mentioned nothing about mitigating factors, the reasonable juror would infer that no such reasonable doubt standard applied to mitigating factors." *Id.* at 797. The court did not recite the instruction at issue, purport to apply *Boyde*, or otherwise explain its rationale. Its one-sentence conclusion thus sheds little light on the proper analysis of the instructions in this case. *Welch* is therefore unpersuasive.[8]

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[8]Kansas also makes reference to the rules of military courts martial. But as the United States explains (at 2 n.2), "jurors in capital court-martial proceedings are instructed to consider and weigh all mitigating 'evidence'—regardless of whether any circumstance had been established by any burden of proof." They are not told to consider only those mitigating circumstances "found to exist," as the jurors were told in this case. *See* Court-Martial R. 1004(b)(6); *United States* v. *Curtis*, 32 M.J.

* * *

Under *Boyde*, an ambiguous instruction violates the Eighth Amendment if "there is a reasonable likelihood that the jury * * * applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." 494 U.S. at 380. Requiring proof of mitigating circumstances beyond a reasonable doubt prevents the consideration of constitutionally relevant evidence. And there is a reasonable likelihood that the jury applied the ambiguous instructions here to require such proof. The Kansas Supreme Court was therefore correct that the jury instructions violated the Eighth Amendment.

B. The Eighth Amendment Prohibits Jury Instructions That Are Ambiguous As To What Mitigating Evidence May Be Given Effect

The jury instructions in this case violated the Eighth Amendment for a second, independent reason. Whether or not a State may require a defendant to prove mitigating circumstances beyond a reasonable doubt, a State certainly may not impose such a burden on *some* defendants but not others. And yet, the ambiguous jury instructions in this case have exactly that effect. Because the instructions "le[ave] [the jury] to speculate" as to what burden applies, *Gleason* Pet. App. 102, some defendants will be

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252, 268 (C.M.A. 1991) (explaining that by eliminating any requirement to find mitigating factors, Rule 1004 "avoids the problem posed in" *Mills*, *i.e.*, that jurors might believe that "a mitigating factor could not be considered at all unless all the jurors concurred in finding that it existed").

sentenced under a reasonable doubt standard, while others will have their mitigating evidence subjected to no burden at all, in accordance with Kansas law.

That arbitrary result is contrary to the Eighth Amendment. *See, e.g.*, *Spaziano*, 468 U.S. at 460 (a State must "administer [the death] penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not"); *supra* pp. 13-15. The Constitution does not tolerate "vague and imprecise" jury instructions that "create[] the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be." *Stringer*, 503 U.S. at 235-236. In *Stringer*, the Court considered the constitutionality of instructing the jury to consider an imprecise aggravating factor in the weighing process. And it explained that the use of an imprecise factor is unconstitutional because it "creates the possibility not only of randomness but also of bias in favor of the death penalty." *Id.*; *see also Tuilaepa* v. *California*, 512 U.S. 967, 979 (1994) (analyzing whether sentencing factors employed at the selection phase were unconstitutionally vague). That is because a jury confronted with a vague aggravating factor may mistakenly add evidence to the aggravation side of the scale, tipping the balance in favor of death.

So too here. A jury confronted with the ambiguous pattern instructions employed in this case might mistakenly conclude that it must discard all of a defendant's evidence that falls short of proving a mitigating circumstance beyond a reasonable doubt. That would improperly remove evidence from the mitigation side of the scale, tipping the balance for

death as surely as the vague aggravator discussed in *Stringer*.

It is of course true that a State may offer the jury *no* guidance as to what evidence may be considered in mitigation. *See Buchanan*, 522 U.S. at 276. But *Stringer* makes clear that if the State does choose to channel the jury's discretion, it may not do so in a manner that infects the process with arbitrariness. After all, the issue in *Stringer* was the effect of an imprecise aggravator at the selection stage, 503 U.S. at 235, where a State is free to leave the consideration of both mitigating *and* aggravating circumstances to the jury's complete discretion. *See, e.g.*, *Tuilaepa*, 512 U.S. at 979 (reiterating that a State is under no obligation to "channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances" at the selection stage (internal quotation marks omitted)). And yet, the Court in *Stringer* had no trouble concluding that the use of an imprecise aggravator at the selection stage was nonetheless unconstitutional. 503 U.S. at 235-236; *see also Tuilaepa*, 512 U.S. at 975-976.

The problem is not that an imprecise aggravator would leave the jury with too much discretion, but rather that it would lead to juror confusion as to the limits the State had placed on this discretion. As a consequence, the same evidence might be treated as aggravating for one defendant but not for another, based merely on what interpretation of the imprecise aggravator the jury happened to adopt. That violates the Eighth Amendment because some defendants will arbitrarily be treated "as more deserving of the death penalty" than others. *Stringer*, 503 U.S. at 235-236. And the same unconstitutional result will

inevitably ensue in this case, where it is reasonably likely that some defendants' mitigating evidence will be held to a reasonable doubt standard because of ambiguity in the instructions, while other defendants will be subject to no burden at all. Because the Eighth Amendment does not countenance that kind of arbitrariness, the jury instructions in this case cannot pass constitutional muster.

CONCLUSION

For these reasons, the judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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ADDENDUM

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RELEVANT KANSAS STATUTORY PROVISIONS

Kan. Stat. Ann. § 21-6617 provides:

(a) If a defendant is charged with capital murder, the county or district attorney shall file written notice if such attorney intends, upon conviction of the defendant, to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death. In cases where the county or district attorney or a court determines that a conflict exists, such notice may be filed by the attorney general. Such notice shall be filed with the court and served on the defendant or the defendant's attorney not later than seven days after the time of arraignment. If such notice is not filed and served as required by this subsection, the prosecuting attorney may not request such a sentencing proceeding and the defendant, if convicted of capital murder, shall be sentenced to life without the possibility of parole, and no sentence of death shall be imposed hereunder.

(b) Except as provided in K.S.A. 21-6618 and 21-6622, and amendments thereto, upon conviction of a defendant of capital murder, the court, upon motion of the prosecuting attorney, shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If any person

who served on the trial jury is unable to serve on the jury for the sentencing proceeding, the court shall substitute an alternate juror who has been impaneled for the trial jury. If there are insufficient alternate jurors to replace trial jurors who are unable to serve at the sentencing proceeding, the trial judge may summon a special jury of 12 persons which shall determine the question of whether a sentence of death shall be imposed. Jury selection procedures, qualifications of jurors and grounds for exemption or challenge of prospective jurors in criminal trials shall be applicable to the selection of such special jury. The jury at the sentencing proceeding may be waived in the manner provided by K.S.A. 22-3403, and amendments thereto, for waiver of a trial jury. If the jury at the sentencing proceeding has been waived or the trial jury has been waived, the sentencing proceeding shall be conducted by the court.

(c) In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-6624, and amendments thereto, and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the

defendant prior to the sentencing proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the sentencing proceeding shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument.

(d) At the conclusion of the evidentiary portion of the sentencing proceeding, the court shall provide oral and written instructions to the jury to guide its deliberations.

(e) If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-6624, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole. The jury, if its verdict is a unanimous recommendation of a sentence of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstances which it found beyond a reasonable doubt. If, after a reasonable time for deliberation, the jury is unable to reach a verdict, the judge shall dismiss the jury and impose a sentence of life without the possibility of parole and shall commit the defendant to the custody of the

secretary of corrections. In nonjury cases, the court shall follow the requirements of this subsection in determining the sentence to be imposed.

(f) Notwithstanding the verdict of the jury, the trial court shall review any jury verdict imposing a sentence of death hereunder to ascertain whether the imposition of such sentence is supported by the evidence. If the court determines that the imposition of such a sentence is not supported by the evidence, the court shall modify the sentence and sentence the defendant to life without the possibility of parole, and no sentence of death shall be imposed hereunder. Whenever the court enters a judgment modifying the sentencing verdict of the jury, the court shall set forth its reasons for so doing in a written memorandum which shall become part of the record.

(g) A defendant who is sentenced to imprisonment for life without the possibility of parole shall spend the remainder of the defendant's natural life incarcerated and in the custody of the secretary of corrections. A defendant who is sentenced to imprisonment for life without the possibility of parole shall not be eligible for commutation of sentence, parole, probation, assignment to a community correctional services program, conditional release, postrelease supervision, functional incapacitation release pursuant to K.S.A. 22-3728, and amendments thereto, or suspension, modification or reduction of sentence. Upon sentencing a defendant to imprisonment for life without the possibility of parole, the court shall commit the defendant

to the custody of the secretary of corrections and the court shall state in the sentencing order of the judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced to imprisonment for life without the possibility of parole.

Kan. Stat. Ann. § 21-6619 provides:

(a) A judgment of conviction resulting in a sentence of death shall be subject to automatic review by and appeal to the supreme court of Kansas in the manner provided by the applicable statutes and rules of the supreme court governing appellate procedure. The review and appeal shall be expedited in every manner consistent with the proper presentation thereof and given priority pursuant to the statutes and rules of the supreme court governing appellate procedure.

(b) The supreme court of Kansas shall consider the question of sentence as well as any errors asserted in the review and appeal and shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

(2) whether the evidence supports the findings that an aggravating circumstance or circumstances existed and that any mitigat-

ing circumstances were insufficient to outweigh the aggravating circumstances.

(d) The court shall be authorized to enter such orders as are necessary to effect a proper and complete disposition of the review and appeal.

Kan. Stat. Ann. § 21-6624 provides:

Aggravating circumstances shall be limited to the following:

(a) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.

(b) The defendant knowingly or purposely killed or created a great risk of death to more than one person.

(c) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(d) The defendant authorized or employed another person to commit the crime.

(e) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(f) The defendant committed the crime in an especially heinous, atrocious or cruel manner. A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious or

cruel. Conduct which is heinous, atrocious or cruel may include, but is not limited to:

(1) Prior stalking of or criminal threats to the victim;

(2) preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel;

(3) infliction of mental anguish or physical abuse before the victim's death;

(4) torture of the victim;

(5) continuous acts of violence begun before or continuing after the killing;

(6) desecration of the victim's body in a manner indicating a particular depravity of mind, either during or following the killing; or

(7) any other conduct the trier of fact expressly finds is especially heinous.

(g) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

(h) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.

Kan. Stat. Ann. § 21-6625 provides:

(a) Mitigating circumstances shall include, but are not limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under extreme distress or under the substantial domination of another person.

(6) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

(7) The age of the defendant at the time of the crime.

(8) At the time of the crime, the defendant was suffering from posttraumatic stress syndrome caused by violence or abuse by the victim.

(b) Pursuant to hearing under K.S.A. 21-6617, and amendments thereto, mitigating circumstances shall include circumstances where a term of imprisonment is found to be sufficient to defend and protect the people's safety from the defendant.